

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG 17 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re)	2 CA-CV 2011-0170
)	DEPARTMENT A
2005 NISSAN XTERRA.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
)	Rule 28, Rules of Civil
)	Appellate Procedure
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV201001434

Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED

James P. Walsh, Pinal County Attorney
By Craig Cameron

Florence
Attorneys for Appellee

William D. Shostak

Chandler
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 Appellant Michael Balthazor appeals from the trial court's order of forfeiture of his 2005 Nissan Xterra. He argues the court should have released his vehicle because the state did not file a forfeiture complaint within the required time period and

because insufficient evidence supported the court's ruling. Because both of his arguments are waived, we affirm.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to sustaining the verdict reached by the trial court,” *In re 4030 W. Avocado*, 184 Ariz. 219, 219, 908 P.2d 33, 33 (App. 1995), however, the factual background is largely undisputed. On March 12, officers seized Balthazor's vehicle in conjunction with a drug investigation and served him with a notice of property seizure. Balthazor filed a claim for the property and the state filed an initiation of civil forfeiture proceedings. Following a hearing, the trial court found probable cause to conduct a forfeiture hearing. After another evidentiary hearing, the court held Balthazor had not shown his vehicle was exempt from forfeiture and ordered it forfeited. The court entered a final judgment and Balthazor appealed.

Discussion

¶3 Balthazor first argues the trial court erred by refusing to release his vehicle, because the state failed to file a complaint within sixty days of filing the notice of forfeiture. “We review the trial court's application of the forfeiture statutes de novo,” but will uphold the court's ruling if it is correct for any reason. *In re \$2,390 U.S. Currency*, 229 Ariz. 514, ¶ 5, 277 P.3d 219, 221 (App. 2012) (emphasis omitted). Further, “[w]e accept the court's factual findings unless they are clearly erroneous.” *Id.*

¶4 We previously have noted a party “can waive by conduct its right to object to an adverse party's failure to comply with statutory, constitutional, contractual, and procedural requirements.” *State ex rel. Horne v. Campos*, 226 Ariz. 424, ¶ 21, 250 P.3d

201, 206 (App. 2011). Waiver occurs when a party's actions are inconsistent with an intent to maintain such a right. *Jones v. Cochise County*, 218 Ariz. 372, ¶ 23, 187 P.3d 97, 104 (App. 2008). We will find a right waived when a party "has taken substantial action to litigate the merits of the claim that would not have been necessary had the entity promptly raised the defense." *Id.* ¶ 26.

¶5 Here, the state seized the vehicle for forfeiture on March 12 and served Balthazor with a notice of property seizure on March 13. Balthazor filed a claim requesting the vehicle's return on April 9 and on May 3 the state filed an "initiation of civil forfeiture proceedings." On June 2, the trial court set a hearing and in late June, the parties participated in a two-day probable cause hearing in which they introduced evidence and examined witnesses. At that hearing, the court ordered some currency forfeited and found probable cause for the forfeiture of the vehicle. On August 20, Balthazor moved to continue the next hearing, asserting he needed additional time for discovery. Finally, on September 20, Balthazor moved for the release of his property, arguing for the first time that the state had failed to file a complaint within the necessary time period. The state then filed a complaint but also responded to the motion, asserting it had not been required to file a complaint. The court ultimately held oral argument and denied Balthazor's motion, reasoning that both the notice of forfeiture and the initiation of forfeiture had been filed timely.

¶6 Balthazar did not raise the lack of the formal complaint until nearly four months after he claims the state was required to file it. If Balthazor had promptly raised and prevailed on such a claim, the parties would not have been required to conduct the

probable cause hearing and Balthazor would not have had to engage in the discovery. Without ruling on the merits, we conclude Balthazor waived his argument by taking substantial action to litigate the forfeiture which would not have been required otherwise. *See Jones*, 218 Ariz. 372, ¶ 26, 187 P.3d at 105.

¶7 Balthazor relies heavily on *In re \$3,636.24 U.S. Currency*, 198 Ariz. 504, 11 P.3d 1043 (App. 2000), to support his argument that the occurrence of hearings and substantial proceedings does not relieve the state of the requirement to file a complaint. In that case, the appellant had filed a claim requesting the release of his property due to the state's failure to initiate forfeiture proceedings within sixty days of seizure. *In re \$3,636.24*, 198 Ariz. 504, ¶ 5, 11 P.3d at 1044. The state then served appellant with a notice of pending forfeiture and filed a complaint, which appellant moved to dismiss based on the state's failure to initiate the proceedings timely. *Id.* ¶¶ 6-8. The trial court held a contested forfeiture hearing, holding appellant had been served properly and finding the property forfeited. *Id.* ¶ 8. On appeal this court held A.R.S. § 13-4308(B) required the property be released based on the state's failure to initiate proceedings within the required timeframe. *Id.* ¶ 15.

¶8 There, the appellant had requested the release of his property based on the state's failure to initiate proceedings before any other action had occurred. He then objected to the state's failure to initiate proceedings by moving to dismiss the complaint immediately after it was filed. By contrast, Balthazor did not raise the state's failure to file a complaint until four months after he asserts it was required and after substantial litigation had occurred. Thus, *In re \$3,636.24* did not decide whether such conduct could

waive the complaint requirement and does not prevent us from finding Balthazor waived his argument by his conduct.

¶9 Balthazor additionally argues the trial court erred in finding the state had probable cause to seize his vehicle in forfeiture proceedings. The state has the initial burden in a civil in rem forfeiture proceeding to show by a preponderance of the evidence that the property is subject to forfeiture. A.R.S. § 13-4311(M). The state meets this burden by establishing the existence of probable cause for the forfeiture “supported by more than a mere suspicion, but less than prima facie proof.” *In re \$315,900.00 U.S. Currency*, 183 Ariz. 208, 211, 902 P.2d 351, 354 (App. 1995), quoting *In re 1986 Chevrolet Corvette*, 183 Ariz. 637, 640, 905 P.2d 1372, 1375 (1994).

¶10 After the probable cause hearing, the trial court found “probable cause exists to set this matter for a forfeiture hearing.” But Balthazor has not provided this court a transcript of that hearing. As the appellant, he has the burden of ensuring all transcripts have been included in the record on appeal. *See Blair v. Burgener*, 226 Ariz. 213, ¶ 9, 245 P.3d 898, 902 (App. 2010). When no transcripts are provided, we assume the record supports the trial court’s conclusions. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Because we lack the transcript from the probable cause hearing, we presume the court correctly found the state met its burden in proving probable cause existed for the forfeiture of Balthazor’s vehicle.

¶11 In his reply brief, Balthazor asserts he also argued in his opening brief that the trial court erred in finding he had not met his burden of proving that a statutory exception applied to the forfeiture of his vehicle. However, he did not make this claim in

his opening brief. We will not consider an argument presented for the first time in a reply brief. *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, n.1, 111 P.3d 1003, 1004 n.1 (2005). Moreover, even in his reply brief, he has failed to develop this argument fully or cite to relevant authority showing how the court erred. *See* Ariz. R. Civ. App. P. 13(a)(6) (“An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.”); *Polanco v. Indus. Comm’n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (appellant’s failure to develop and support argument waives issue on appeal). Balthazor has, therefore, waived this issue on appeal.

Attorney Fees

¶12 Balthazor requests costs, attorney fees, and sanctions pursuant to A.R.S. §§ 12-341.01(C) and 12-349. Because we find in the state’s favor, we deny Balthazor’s request.

Conclusion

¶13 For the foregoing reasons, we affirm.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge